

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,)	
)	
)	
Plaintiff,)	Civil Action
)	No.
v.)	
)	
REBECCA BLANK, in her official capacity as)	
Acting Secretary of Commerce of the United States;)	
the UNITED STATES DEPARTMENT OF)	
COMMERCE; DR. KATHRYN D. SULLIVAN,)	
in her official capacity as Acting Under Secretary)	
and Administrator for the National Oceanic)	
and Atmospheric Administration; the)	
NATIONAL OCEANIC AND ATMOSPHERIC)	
ADMINISTRATION; SAMUEL D. RAUCH III,)	
in his official capacity as Acting Assistant)	
Administrator For Fisheries of the National Marine)	
Fisheries Service; the NATIONAL MARINE)	
FISHERIES SERVICE; and the)	
UNITED STATES OF AMERICA,)	
)	
Defendants.)	

PETITION FOR JUDICIAL REVIEW

INTRODUCTION

1. In this action, the plaintiff, the Commonwealth of Massachusetts (“Massachusetts”) challenges Frameworks 48 and 50 (the “Frameworks”), interim final rules issued by Secretary of Commerce (the “Secretary”) and promulgated as regulatory amendments to 50 C.F.R. § 648 on May 3, 2013, with an effective date of May 1, 2013.

2. The devastating impact of the Frameworks on the families and small businesses that earn their living fishing groundfish, and on the communities where they reside, is beyond

dispute. The Secretary, through the National Oceanic and Atmospheric Administration (“NOAA”), has reduced by 77% the allowable catch for certain groundfish in New England, threatening the extinction of an industry that for more than a century has been part of the commercial and social fabric of New England, especially Massachusetts.

3. As described more fully below, the Frameworks land this devastating blow to the Massachusetts fisheries in violation of the Magnuson-Stevens Act which governs Fishery Management Plans, of which the Frameworks are a part. NOAA and the Secretary failed to conform to the statutory safeguards enacted to balance the twin goals of environmental protection and sustainable access to the fisheries, by, among other things: a) failing to achieve optimum yield from the New England groundfish fisheries, b) dictating conservation and management measures that are not based on the best scientific information available, c) failing to meaningfully take into account the importance of fishery resources to fishing communities, and d) refusing to meaningfully provide for the sustained participation of, or to minimize the adverse effects upon, those fishing communities. These deficiencies in NOAA’s promulgation of the Frameworks contravene at least the First, Second and Eighth National Standards set forth in the Magnuson-Stevens Act. As such, the Frameworks should be vacated as contrary to applicable law.

JURISDICTION AND VENUE

4. This action arises under 16 U.S.C. §§ 1855(f) and 1861(d). This Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1331; 16 U.S.C. §§1855(f) and 1861(d); and the Administrative Procedure Act, 5 U.S.C. § 702. Declaratory relief is proper under 28 U.S.C. § 2201. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C.

§ 703.

PARTIES

5. The Commonwealth of Massachusetts is a sovereign state of the United States. The Commonwealth and its citizens, especially the fishing communities in ports like Gloucester and New Bedford, will suffer devastating economic and social impacts due to The Frameworks.

6. The Acting Secretary of Commerce, Rebecca Blank, is sued solely in her official capacity. The Secretary is authorized under 16 U.S.C. §§ 1801, et seq., to approve Fishery Management Plans (“FMPs”), and amendments thereto, and to promulgate regulations implementing such plans or amendments. The Department of Commerce is an agency of the United States.

7. Dr. Kathryn D. Sullivan is the Undersecretary and Administrator of the National Oceanic and Atmospheric Administration and is sued solely in her official capacity. The National Oceanic and Atmospheric Administration (“NOAA”) is an agency of the United States and has administrative responsibility for the implementation of FMPs.

8. Samuel R. Rauch III is the Assistant Administrator for Fisheries of the National Marine Fisheries Service and is sued solely in his official capacity. The National Marine Fisheries Service (“NMFS”) is an agency of the United States and has administrative responsibility for the implementation of FMPs. NMFS’s eight regional fishery management councils are tasked with the development of FMPs. The New England Fishery Management Council authored the FMP at issue in this case, pertaining to the Northeast Multispecies Fishery.

FACTS

Background

9. In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act, amended in significant part by the Sustainable Fisheries Act in 1996 and then reauthorized by the Magnuson-Stevens Act of 2006 (“MSA”). 16 U.S.C. §§ 1801, et seq. The MSA was enacted by Congress to develop a national program for the conservation and management of the fishery resources of the United States in order to prevent overfishing, to facilitate long-term protection of certain threatened fish stocks, and to realize the full economic potential of the nation’s fishery resources, as a food source and for other purposes.

10. The MSA authorizes the creation of eight fishery management councils, each one representing a coastal region. 16 U.S.C. §1852. The New England Fishery Management Council (“the Council”) represents Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut and has direct authority over the Northeast Multispecies Fishery. Each council is required to prepare, and subsequently amend, fishery management plans that contain conservation and management measures to prevent overfishing and rebuild overfished stocks while promoting the long-term health of and stability of the fishery.

11. These fishery management plans (“FMP’s”) are obligated to conform to the ten “National Standards” that act as guiding principals for the MSA. 16 U.S.C. § 1851. The National Standards demand that FMP’s, *inter alia*, prevent overfishing while achieving optimum yield from each fishery; are based on the best scientific information available; not discriminate between residents of different States; minimize costs and avoid unnecessary duplication; take

into account the importance of fishery resources to fishing communities; and promote the safety of human life at sea. 16 U.S.C. § 1851.

12. The Council is charged with preparing and submitting FMP's that govern the Northeast Multispecies Fishery, a mixed-species fishery comprising various commercially significant groundfish, including multiple species and stocks of haddock, cod and flounder. The Council also prepares, for review, approval, and implementation in federal regulations by the Secretary, any amendments, frameworks, or emergency rules that may periodically become necessary to supplement the Northeast Multispecies FMP.

13. The Northeast Multispecies Fishery includes 15 species of groundfish, further subdivided by size and other elements of fishery management. Twelve species are managed as large mesh species, based on fish size and type of gear used to harvest the fish: Atlantic cod, haddock, pollock, yellowtail flounder, witch flounder, winter flounder, windowpane flounder, American plaice, Atlantic halibut, redfish, ocean pout and white hake. Three species—silver hake (whiting), red hake, and offshore hake—are managed under a separate small mesh multispecies program, Amendment 12 to the Northeast Multispecies FMP. Several large mesh species are also managed as two or more separate stocks, based on geographic region. For example, Atlantic cod is managed as two stocks: Georges Bank cod and Gulf of Maine cod. While these fifteen groundfish species exhibit unique body types, behaviors and habitat preferences, all are demersal, living near the bottom and feeding on benthic organisms. Groundfish are found throughout New England waters, from the Gulf of Maine to Southern New England.

14. The Council adopted the Northeast Multispecies Fishery Management Plan in 1986 ("NEFMP"). Historically, the NEFMP limited fishing activity through a days-at-sea

program, restricting fishing efforts by the amount of days fishermen were allowed out on their vessels to catch the eligible fish on their permits.

15. In an effort to address overfishing, especially in groundfish stocks that the Council considered more depleted, the NEFMC transitioned in 2004 to a “catch shares” system through Amendment 13. 69 Fed. Reg. 22906 (Apr. 27, 2004). Catch shares is a quota-based system that places a cap on the total allowable limit on a particular fishery stock. A key component to the catch shares system is the sector program, introduced through Amendment 16. 75 Fed. Reg. 18262 (Apr. 9, 2010). Sectors are groups of fishermen who voluntarily join together and pool their respective catch share allocations to maximize the return on investment. When joining a sector under Amendment 16, each permit holder is given a “potential sector contribution,” (“PSC”) based on the permit’s landing history (a proportional measure of the fishing vessels’s landing history over a period of time). All the sector vessels’ PSCs are aggregated together to make up the total sector’s catch limit, or “Annual Catch Limit” (“ACL”). The boats that do not join a sector become part of a common pool and are subject to a different set of regulations more akin to the days-at-sea program.

16. While the Northeast Fisheries continued to adjust to the catch shares and sector systems, the Council in June 2012 initiated development of the Frameworks, the subject of this lawsuit, which ultimately reduces by 77% groundfish allotments in New England.

17. The Frameworks is the latest in an unfortunate series of actions by NOAA that have threatened, instead of cultivated the success of, New England fisheries and fishermen. As well-documented by the Department’s Inspector General, NOAA’s recent enforcement history demonstrates a callous disregard for the well-being of New England fishermen.

18. In 2009, Massachusetts Senators and Congressmen asked that the NOAA Administrator "investigate allegations of excessive penalties and retaliatory actions by the Office of Law Enforcement for the Northeast Region of the National Marine Fisheries Service." The legislators' letter explained that fines being assessed to New England's fishing industry were not proportionate to the alleged violations, and that certain New England fishermen were being treated differently than others and in a heavy handed manner by the federal government. *See* Letter, dated May 1, 2009 (a copy of which is available at http://www.oig.doc.gov/OIGPublications/OIG-19887_NOAA_Request.pdf.)

19. In early June of 2009, NOAA asked the Department of Commerce's Inspector General to "initiate a nationwide review of the policies and practices of NOAA's Office of Law Enforcement and General Counsel Office for Enforcement and Litigation." *Id.* The Inspector General established an investigative team with the necessary expertise to analyze and address the issues raised. *See* Memorandum, dated June 19, 2009 (a copy of which is available at http://www.oig.doc.gov/OIGPublications/OIG-19887_Announcement.pdf).

20. The results of the IG's investigation were startling. In a report dated January 21, 2010, the IG "found systemic, nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry. These issues have contributed significantly to a highly-charged regulatory climate and dysfunctional relationship between NOAA and the fishing industry -- particularly in the Northeast Region." *See* "Review of NOAA Fisheries Enforcement Programs and Operations," Final Report No. OIG-19887 ("Report") at 3 (a copy of which is available at <http://www.oig.doc.gov/OIGPublications/OIG-19887.pdf>).

21. The IG investigated concerns that NOAA's fines were "excessive, constituting a form of bounty, because NOAA is able to retain the proceeds from its enforcement cases." The Report found that NOAA indeed had an asset forfeiture fund with a balance of \$8.4 million as of December 31, 2009, that the account had "weak internal controls" and that the IG "could not readily determine how NOAA had utilized" the funds it had collected. Report at 5.

22. The IG Report found that:

[A]ggregate fine assessments in the Northeast Region were inconsistent with those in the other five regions. This regional disparity fosters an appearance that fine assessments in the Northeast Region are arbitrary. . . . [Indeed, initial fine assessments were found to be] two-and-a-half times greater than the second highest region and about five times or more greater than the other four regions.

Report at 13.

23. Against this backdrop of dysfunction and distrust between NOAA and the fishermen it regulates, NOAA undertook The Frameworks's drastic reduction in groundfish catch allocations.

The Frameworks as a Response to Inconsistent Groundfish Stock Assessments

24. The Council developed the Frameworks in response to benchmark and assessment updates completed by NOAA for all groundfish stocks during 2012.

25. The 2012 updated stock assessments, according to NOAA, indicated that several stock species were overfished. NOAA therefore proposed substantial reductions in catch limits for some stocks.

26. At its December 2012 meeting, the Council voted to split the Frameworks into two, allowing more time to consider the new catch limits. Proposed specifications for FY2013-

FY2015 were placed into Framework 50, and approved by the Council at its January 2013 meeting.

27. The remaining portion of the Frameworks was published for public comment on March 25, 2013 as part of a Proposed Rule. 78 Fed. Reg. 18188 (Mar. 25, 2013). Among other things, the Frameworks: (1) identified new status determinations for Gulf of Maine (GOM) cod, Georges Bank (GB) cod and Southern New England/Mid-Atlantic SNE/MA yellowtail flounder based on 2012 and 2013 assessments; (2) established allocations of SNE/MA windowpane flounder and GB yellowtail flounder for exempted fisheries and modified the allocation of GB yellowtail flounder to the scallop fishery to address increased bycatch of these species; (3) amended existing accountability measures (AMs) for GOM/GB and SNE/MA windowpane flounders, ocean pout, and Atlantic halibut and established new "reactive" AMs for Atlantic wolffish and SNE/MA winter flounder, charting the path for the other parallel action, Framework 50, which would set acceptable biological catches (ABCs) and annual catch limits (ACLs) for fishing years (FY) 2013-2015; (4) established measures intended to improve the administration of the fishery and enhance fishing opportunities for groundfish vessels to mitigate potential negative economic impacts from reductions in catch limits proposed by Framework 50; and (5) imposed several regulatory changes to correct errors in the multispecies regulations. The proposed Frameworks were to be effective on May 1, 2013.

28. On May 3, 2013, NMFS announced that it partially approved the Frameworks to the FMP in an Interim Final Rule. 78 Fed. Reg. 26118 (May 3, 2013). The most significant of the adopted proposals in the Interim Final Rule are (i) the new status determinations for Gulf of Maine (GOM) cod, Georges Bank (GB) cod and Southern New England/Mid-Atlantic SNE/MA

yellowtail flounder based on 2012 and 2013 assessments; (ii) revisions to the allocation of GB yellow tail flounder to the scallop fishery; and (iii) establishment of sub-annual catch limits of GB yellowtail flounder and SNE/MA windowpane flounder for the scallop and other non-groundfish fisheries.

29. The ultimate impact of the Frameworks, effective May 1, 2013, was to decrease by 77% the allotted groundfish catch for New England. The Interim Final Rule contained no meaningful measures to mitigate the devastating economic impacts of the rule.

The Frameworks Rely on Highly Suspect Science to Threaten an Entire Industry

30. As noted above, this massive and unexpected decrease in groundfish allotments was based on certain NOAA assessments of groundfish stocks that occurred in 2012 and 2013. In June 2012, NOAA performed its assessment for SNE/MA yellowtail flounder. Although the results were ambiguous by Council standards, a determination was made that the yellowtail flounder stock was not experiencing overfishing and was indeed rebuilt.

31. NOAA performed assessments for both GOM cod and GB cod in December 2012. NOAA contended those assessments showed overfishing and that those stocks were overfished.

32. NMFS approved the proposed status determinations on the basis that the results of the assessments represented the best scientific information available for management. This determination is belied by the comments received concerning the Frameworks, deeply questioning the scientific information relied upon by the NMFS.

33. During the comment period on the Proposed Rule, NMFS received 75,393 comments. Among the most pertinent were the comments raised by the the Maine Department

of Marine Resources and the Northeast Seafood Coalition. Those commenters questioned the NMFS methodology and results with respect to the GOM cod, GB cod and SNE/MA yellowtail stock assessments.

34. Both the reduced estimates by NOAA and the changed counting methodology underpinning those estimates have been roundly criticized and questioned by those that are most familiar with the groundfish fisheries—the fishermen who are the victims of NOAA’s new Frameworks.

35. The Northeast Seafood Coalition (“NSC”), among others, asserted that the Status Determination Criteria used to assess the groundfish stock is based on antiquated and unfounded scientific methods, and is not the best science available. During the Frameworks comment period, the NSC reminded NMFS of its urgent call to the Council in January 2013 to reconsider its methodology for assessing the status of groundfish stocks and submitted alternatives to the Science and Statistical Committee for review and approval.

36. To determine whether a fish species, or stock, is overfished, it is critical to determine the maximum harvest that still allows the species to replenish itself. This maximum harvest is referred to as the maximum sustainable yield (MSY). If harvesting rates exceed replenishment rates, the stock is determined to be undergoing overfishing. Here, the Council did not use an appropriate type of scientific methodology when it refused to determine the MSY. Rather than determining the MSY, the Council chose to use a MSY proxy to determine groundfish stock assessments.

37. The use of a proxy may be appropriate when there is no actual data available or an MSY cannot be estimated. As NSC argued in its Comment, there has been considerable data

made available since 2002 (the date of the FMY proxy evaluation) to suggest an estimation of FMY of specific groundfish stocks is attainable. Moreover, as NSC pointed out, certain modeling techniques, like the use of age-aggregated biomass dynamics, can be used to provide estimate for specific stocks.

38. Beyond the contention that applying a proxy was unnecessary, NSC also suggested that the proxy was based on antiquated data and its use is arbitrary. According to NSC, the 2002 Working Group that presented the MSY proxy to the Council for a “best science available” determination presented only this one method and only one of the several versions of the method to the Council. The methodology at basis of the 2002 Working Group MSY proxy was based on West Coast stock fish assessments and was developed ten years prior to the Working Group’s recommendation. Since then, the West Coast fisheries have adopted a different proxy, and the scientist who performed the simulations has questioned his methodologies.

39. Notwithstanding the infirmities in the underlying science and methodology, NOAA relied upon the new stock assessments to establish new catch limits. Those catch limits drastically reduced allotments for groundfish catch, by 77% from 2012 levels to 2013. NOAA and the Secretary elected to endanger an industry based on unfounded and deeply questioned science.

The Frameworks are Certain to Devastate Massachusetts Fisheries, Fishermen, Fishing Communities and the Fishing Economy, as Demonstrated by the Commerce Department’s Declaration of a “Commercial Fishery Failure.”

40. It is beyond dispute that the decreased allotments in the Frameworks are likely to prove devastating to the groundfish fishermen and the communities where they reside. NOAA

acknowledged, as it must, that a 77% reduction in catch allotments is likely to severely decrease revenue and risk the viability of many fishing businesses.

41. The best evidence of the disastrous economic consequences of Framework 42 is the Department's own declaration, on September 13, 2012, of a commercial fishery failure with respect to the Northeast Multispecies Fishery.

42. Recognizing the inescapable threat posed to the groundfish industry by NMFS's 2012 stock assessments, on August 13, 2012, Massachusetts Governor Deval Patrick asked the Secretary to declare a fishing disaster "so that direct economic relief can be provided to fishermen in Massachusetts." Governor Patrick further stated: "it is now clear that this resource disaster is not the fault of our fishermen who have been following the federal fisheries management plans, and I urge you to continue to improve fisheries science to allow for more accurate fisheries management decisions in the future."

43. On September 13, 2012, Acting Secretary of Commerce Rebecca M. Blank granted the Governor's request, and declared a fishing disaster: "I have determined that a commercial fishery failure due to a fishery resource disaster will exist for the Northeast Multispecies Groundfish Fishery for the 2013 fishing year." Letter, dated Sept. 13, 2012 (a copy of which is available at http://www.nmfs.noaa.gov/stories/2012/09/docs/blank_patrick_9_13_12.pdf). Further, the Secretary stated that: "After reviewing the information available on the potential catch limits for the 2013 fishing year, I am deeply concerned about the potential impacts to the Northeast fishermen and fishing communities." *Id.* The Acting Secretary acknowledged that fishermen had recently adhered to catch limits, but that "low levels of these stocks are causing a significant loss of access to fishery resources with anticipated revenue declines that will greatly

affect the commercial fishery.” *Id.* The Secretary further assured the Governor that both NOAA and the Department of Commerce would continue to work with the Council “in advance of the 2013 fishing year to explore all possible options to mitigate” the negative impacts of reduced allotments. *Id.*

44. These assurances from the Acting Secretary in September 2012 were completely consistent with the Eighth Standard of the MSA, which requires that FMP’s endeavor to sustain fishing communities and, to the extent practicable, minimize adverse economic impacts on fishing communities. 16 U.S.C. § 1851(a)(8).

45. However, when NOAA proposed and then adopted the Frameworks, it barely gave lip service to the Eighth Standard. NOAA acknowledged that drastic cuts in catch allotments would cause drastic decreases in revenue and endanger the livelihood of many fishermen and their communities, but proceeded forward based on suspect science and without meaningfully accounting for the known and serious economic hardship that would result.

46. NOAA also failed to enact measures to meaningfully mitigate the impact of the Frameworks on fishermen and their communities as required by the Eighth Standard.

47. Indeed, when the severe consequences of the 2012 fish assessments became clear—namely, drastic reductions in catch allotments—the Council voted 16 to 1 to request that NOAA implement “interim measures” for GOM cod and GOM haddock. In a December 28, 2012 letter to John Bullard, NOAA Northeast Regional Administrator, the Council urged NOAA to implement the MSA in a flexible manner “so that the fishing industry and communities can survive until the long-term improvements that will result from stock rebuilding can be realized.”

The Council pointed to groundfish revenues that could decline 28 to 42 percent due to the Frameworks.

48. The Regional Administrator declined any interim measure to mitigate the impact of the Frameworks. By letter dated January 25, 2013, two United States Senators and three Congressmen urged the Regional Administrator to reconsider, citing the Department's "unprecedented step of declaring an economic disaster for the groundfish fishery before the season even has started" and the "severe economic hardship" to be faced by coastal communities. January 25, 2013 Letter to John Bullard from Senators Warren and Cowan, and Representatives Markey, Tierney and Keating.

49. Despite these requests, the Frameworks were published as a proposed rule on March 25, 2013 and finally adopted on May 3, 2013, effective May 1.

50. In the final illustration of the federal government's callous disregard for the plight of New England fishermen, the Department and NOAA have ignored the statutory mandate for mitigating the fishery failure caused by the Frameworks. The Magnuson-Stevens Act acknowledges that, on occasion, fishery management efforts may cause a "fisheries disaster," like the one declared here, but the Act then provides for federal mitigation of those disasters. Section 1861a of the Act provides that once the Secretary declares a commercial fishery failure,

the Secretary is authorized to make sums available to be used by the affected State, fishing community, or by the Secretary in cooperation with the affected State or fishing community for assessing the economic and social effects of the commercial fishery failure, or any activity that the Secretary determines is appropriate to restore the fishery or prevent a similar failure in the future and to assist the fishing community affected by such a failure.

16 U.S.C. § 1861a(a)(2).

51. In the press release that accompanied her declaration of a fishery failure, Acting Secretary Blank acknowledged the need for federal mitigation of the economic harm caused by the fishery failure: “The future challenges facing the men and women of this industry and the shore-based businesses that support them are daunting, and we want to do everything we can to help them through these difficult times.” Notwithstanding the Secretary’s stated intention and the glaring need for mitigation of the economic impacts of the fishing disaster in Massachusetts, neither NOAA, the NMFS or the Department has identified or implemented meaningful mitigation efforts as required by the MSA.

52. In promulgating the Frameworks, the Secretary arbitrarily refused to conform to the National Standards set forth in the MSA by, *inter alia*, a) failing to establish an amendment to an FMP that achieved optimum yield from the Northeast groundfish fisheries; b) establishing conservation and management measures that were not based on the best scientific information available; and c) failing to give meaningful consideration to the social and economic effects the proposed regime would have upon Massachusetts fishermen and fishing communities. Thus, the Frameworks violates the “national standards” incorporated into the Act; arbitrarily and capriciously deprives Massachusetts fishermen of their ability to derive an optimum yield from the multispecies fishery as provided in the Act; and otherwise represents an abuse of the Secretary’s discretion.

COUNT ONE
(Violation of the Magnuson-Stevens Act)
(National Standard 1 – Achieving Optimum Yield)

54. Massachusetts hereby restates and incorporate by reference the allegations contained in paragraphs 1 through 53 of this petition.

55. Section 1851(a) of the Magnuson-Stevens Act sets forth ten “national standards” with which all FMPs “shall” be consistent. Compliance with these national standards is the yardstick by which FMPs, and amendments thereto, are measured on judicial review.

56. National Standard One, set forth at 16 U.S.C. § 1851(a)(1), directs that: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”

57. The Frameworks prevent fishermen in the Northeast Multispecies Fishery from achieving the optimum yield of the healthy groundfish species in the groundfish fishery. As such, the Frameworks violate National Standard One, is contrary to law, and should be declared invalid and enjoined.

COUNT TWO
(Violation of Magnuson-Stevens Act)
(National Standard Two -- Using Best Scientific Information Available)

58. Massachusetts restates and incorporates by reference the allegations contained in paragraphs 1 through 57 of this petition.

59. National Standard Two, set forth at 16 U.S.C. § 1851(a)(2), directs that: “Conservation and management measures shall be based upon the best scientific information available.”

60. The action taken by the Secretary under the Frameworks implements revised status determination criteria for GOM cod, GB cod and SNE/MA yellowtail flounder and white hake based on new benchmark assessments completed for these stocks in 2012. While NMFS approved the proposed status determination criteria for these stocks, claiming that the assessments represent the best scientific information available for fisheries management, the

comments submitted during promulgation of the Frameworks demonstrate otherwise. See ¶¶ 34-39, *supra*.

61. The Secretary violated National Standard Two by implementing a fishery management regime unsupported by the best available scientific information, and based on a formula that lacked a scientific foundation.

62. The Secretary acted unlawfully, arbitrarily and abused his discretion by approving an FMP that did not comply with National Standard Two.

COUNT THREE
(Violation of Magnuson-Stevens Act)
(National Standard Eight -- Sustained Participation of Fishing Communities)

63. Massachusetts hereby restates and incorporates by reference the allegations contained in paragraphs 1 through 62 of this petition.

64. National Standard Eight, set forth at 16 U.S.C. § 1851(a)(8), directs that: “Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities; and (B) to the extent practicable, minimize adverse economic impacts on such communities.”

65. As described above, the 77% reduction in allotments contained in the Frameworks will have a devastating impact upon Massachusetts fishermen who fish exclusively or primarily in the Northeast groundfish fisheries. Numerous commenters explained that those reduced allotments were not sufficient to sustain the solvency of many, if not most Massachusetts groundfish fishermen, let alone allowing fishermen to realize a livelihood.

66. NOAA and the Department have acknowledged the catastrophic impact of the Frameworks on fishermen and their communities. Among other things, the Acting Secretary declared a commercial fishery failure due to a “fishery resource disaster” for Northeast Multispecies Groundfish Fishery.

67. NOAA and the Department have failed to identify or implement any meaningful measures to mitigate the severe economic harm caused by the Frameworks.

68. Accordingly, the Frameworks violate National Standard Eight, as it severely jeopardizes the sustained participation of such fishing communities in the groundfish fishery, and offers no meaningful mitigation of its economic impacts upon fishermen and their communities.

69. The Secretary’s action in approving the Frameworks is therefore unlawful, arbitrary and capricious. It should be declared unlawful and enjoined.

PRAYER FOR RELIEF

WHEREFORE, Massachusetts respectfully requests that the Court, after a hearing on the merits:

1. Permanently enjoin the defendants from implementing the Frameworks, because, among other things, they are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the Magnuson-Stevens Act, and they are in excess of statutory jurisdiction, authority, or limitations, and short of statutory right;

2. Enter a declaration that the Frameworks are invalid under the Magnuson-Stevens Act because, among other things, they fail to achieve optimum yield from the Northeast Multispecies Fishery, are not based on the best scientific information available, and fail to minimize adverse economic impacts on Massachusetts fishing communities;

3. Grant Massachusetts such other and further relief as proper.

COMMONWEALTH OF MASSACHUSETTS,

By its attorneys,

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